

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION)	
OF DELMARVA POWER & LIGHT)	
COMPANY, EXELON CORPORATION,)	
PEPCO HOLDINGS, INC., PURPLE)	
ACQUISITION CORPORATION, EXELON)	PSC DOCKET NO. 14-193
ENERGY DELIVERY COMPANY, LLC AND)	
NEW SPECIAL PURPOSE ENTITY FOR)	
APPROVALS UNDER THE PROVISIONS OF)	
26 DEL. C. §§ 215 and 1016 (Filed June 18,)	
2014))	

**JOINT APPLICANTS' RESPONSE IN OPPOSITION
TO INTERVENOR JEREMY FIRESTONE'S
MOTION FOR CEASE AND DESIST ORDER AND MOTION
TO VACATE AND SET ASIDE STAY ORDER**

The Joint Applicants, by and through undersigned counsel, respectfully respond to the pending motions brought by Intervenor Jeremy Firestone, including his “Motion for Cease and Desist Order Restraining the Delaware Division of the Public Advocate from Taking Actions Antagonistic to the Amended Settlement Agreement” filed December 11, 2015 (the “Cease and Desist Motion”), and his “Motion to Quash, Vacate and Set Aside Unlawful Hearing Examiner Stay Order” filed January 11, 2016 (the “Motion to Quash”).¹ As grounds for their opposition to the Motions, the Joint Applicants state as follows:

¹ On January 12, 2016, Dr. Firestone also filed a “Petition for Interlocutory Review of Hearing Examiner’s Unlawful Actions.” The Petition for Interlocutory Review makes the same substantive arguments as are presented in the Cease and Desist Motion and the Motion to Quash. Therefore, the Joint Applicants have not separately responded to the Petition for Interlocutory Review.

BACKGROUND

This Docket and the Amended Settlement Agreement

1. This docket concerns an application for approval of a merger of Pepco Holdings, Inc. (“PHI”), and Exelon Corporation (“Exelon”), filed June 18, 2014 (the “Application”). The proposed merger of Exelon and PHI (the “Merger”) will result in a change of control of Delmarva Power & Light Company (“Delmarva Power”), a regulated electric and gas utility subject to the jurisdiction of the Commission.

2. Following extensive negotiations during the early part of 2015, the Joint Applicants reached an agreement to settle issues related to the Merger with various parties to this docket. On April 7, 2015, the Joint Applicants filed an Amended Settlement Agreement (the “Amended Settlement Agreement” or “ASA”) by and among the Joint Applicants, the Staff of the Public Service Commission, the Division of the Public Advocate (“DPA”), the Department of Natural Resources and Environmental Control (“DNREC”), the Delaware Sustainable Energy Utility, the Mid-Atlantic Renewable Energy Coalition (“MAREC”), and the Clean Air Council (collectively, the “Settling Parties”). While Dr. Firestone agreed not to oppose the Amended Settlement Agreement, he is not a signatory, and therefore is not a Settling Party.

3. The Amended Settlement Agreement is the product of exhaustive negotiations among the Settling Parties. Among other things, the Amended Settlement Agreement provides for a substantially enhanced customer rate credit, new commitments related to reliability capital spending and electric reliability standards, commitments related to local employment, workforce development and community involvement, risk mitigation measures, and commitments related to renewable power and energy efficiency.

4. Included among the Amended Settlement Agreement's provisions related to renewable energy is a paragraph requiring that Delmarva Power conduct competitive requests for proposals for the purchase of renewable energy credits ("RECs") on commercially reasonable terms. ASA ¶ 84. The Amended Settlement Agreement calls for RECs to be bid and purchased in three tranches subject to the oversight and approval of the Commission. ASA ¶ 84. The Settling Parties anticipate that the RFP process for purchasing RECs will be used by Delmarva Power to meet the renewable portfolio standards ("RPS") existing under Delaware law. ASA ¶ 84. The Amended Settlement Agreement also provides that if conditions change, including a material change in the number of RECs that Delmarva Power must procure or a substantial change in the cost of RECs, the Settling Parties will work in good faith with each other to address such change, and if appropriate, seek approval for modifications from the Commission related to Delmarva Power's REC purchase obligations. In the event that there is a substantial change in the market for RECs, the Settling Parties are required to consider such changes and are given the option to propose potential modifications to the REC purchase requirement of the settlement.²

Commission Approval of the Merger and Current Status

5. Following a full evidentiary hearing held April 7, 2015 and deliberations held May 19, 2015, the Commission entered Order No. 8746 on June 2, 2015, approving the

² The Amended Settlement Agreement states: "The Settling Parties agree that if circumstances or conditions change (including but not limited to a material change in the projected load of Delmarva Power such that fewer RECs are required, or a substantial change in the cost of RECs through the spot market such that additional spot-market purchases in lieu of long-term contract purchases would be prudent), they will work in good faith with each other and present any proposed modification to the Commission as may be warranted by those changed conditions." ASA ¶ 84.

Amended Settlement Agreement and the Merger. During the evidentiary hearing held April 7, 2015, Dr. Firestone acknowledged that certain provisions of the Amended Settlement Agreement had been modified to address his concerns and objections.³ None of the modifications that Dr. Firestone sought and obtained concerning the Amended Settlement Agreement related to the REC purchase requirements in paragraph 84. In light of the changes to the Amended Settlement Agreement, Dr. Firestone confirmed on the record that he withdrew his objections to the Merger and that he also withdrew his previously advanced objections to the procedure followed in this docket.⁴ He did not, however, join in the Amended Settlement Agreement or enter into it as a party.⁵

6. In Order No. 8746, the Commission approved the Merger and reserved the right to issue further orders, including orders related to the “most favored nation” or “MFN” provisions of the Amended Settlement Agreement. The MFN provisions require certain adjustments to the benefits in Delaware associated with the Merger, if additional benefits are provided to other jurisdictions as a result of the Merger approval process in such jurisdictions. Order No. 8746 ¶¶ 15, 17; ASA ¶¶ 103-105.

7. The Merger has not yet closed because regulatory approval has not been received in the District of Columbia. However, a settlement agreement among many parties to the proceedings in that jurisdiction has been submitted to the D.C. Public Service Commission for

³ See April 7, 2015 Hearing Transcript at 533:8-537:17.

⁴ April 7, 2015 Hearing Transcript at 534:2-7.

⁵ April 7, 2015 Hearing Transcript at 534:8-11.

approval. The D.C. Public Service Commission has set a schedule that would allow it to issue a determination related to the Merger during the first quarter of 2016.⁶

Proceedings Related to the RPS “Cost Cap” and Freeze Procedures

8. The two Motions brought by Dr. Firestone concern matters not only arising in the instant docket, but also matters raised in an unrelated docket before the Commission – Docket No. 15-1462 – as well as a rule-making proceeding undertaken by DNREC. Those proceedings involve an RPS freeze (or “Cost Cap”) option created by the General Assembly. Pursuant to 26 Del. C. § 354(i) and (j), DNREC’s Division of Energy and Climate, after consultation with the Commission, is empowered to freeze further annual percentage increases in the RPS requirements if it should determine that the cost of compliance with such RPS requirements exceeds certain thresholds.

9. In Docket No. 15-1462, DPA sought to have the Commission adopt further rules and regulations related to the RPS freeze provisions.⁷ After consideration of DPA’s application, the Commission issued Order No. 8807, in which it determined not to promulgate further regulations related to the freeze process.⁸ DPA has filed an appeal of Order No. 8807 in the Delaware Superior Court.⁹

⁶ D.C. Public Service Commission, Case No. 1119, Order No. 18011 ¶ 59 (Oct. 28, 2015) (adopting a procedural schedule to consider the proposed settlement and stating the Commission’s opinion that the matter can be resolved in 150 days).

⁷ The Commission in 2011 issued regulations related to 26 Del. C. § 354(i) and (j). 26 Del. Admin. Code § 3008-3.2.21.

⁸ PSC Docket No. 15-1462, Order No. 8807 (Dec. 3, 2015).

⁹ DPA’s appeal to the Delaware Superior Court is docketed as Appeal No. N15A-12-002 FSS. See Order No. 8844 ¶ 2.

10. As noted in Order No. 8807, DNREC also has conducted rule-making proceedings related to the RPS freeze/Cost Cap provisions which concern, among other things, the manner in which RPS costs will be calculated and the circumstances in which a freeze of annual RPS percentage increases may be invoked. Order No. 8807 ¶ 6. Specifically, DNREC's Division of Energy and Climate considered and adopted regulations related to the freeze/Cost Cap provisions of Section 354(i) and (j). DPA participated in those DNREC proceedings. On December 15, 2015, DNREC issued Secretary's Order No. 2015-EC-0047, adopting a regulation entitled "Implementation of Renewable Energy Portfolio Standards Cost Cap Provisions," 7 Del. Admin. Code § 104 (the "Cost Cap Regulation"). Nothing in the Cost Cap Regulation freezes RPS requirements, or otherwise affects Delmarva Power's obligation under the Amended Settlement Agreement. DPA has filed an appeal of DNREC's Cost Cap Regulation to the Delaware Superior Court.¹⁰

The Pending Motions and the Hearing Examiner's Stay Order

11. On December 11, 2015, Dr. Firestone filed the Cease and Desist Motion. As its title implies, the Cease and Desist Motion requests that the Commission issue a "cease and desist" order to preclude DPA from advocating positions with respect to the rate freeze/Cost Cap provisions of Delaware Code that Dr. Firestone characterizes as "antagonistic to the Amended Settlement Agreement." Dr. Firestone takes the position that DPA's advocacy before DNREC with respect to the RPS Cost Cap provisions is inconsistent with (or "antagonistic to") the Amended Settlement Agreement and that the Commission should enter a restraining order to prohibit DPA from advocating such positions. Cease and Desist Motion p. 8.

¹⁰ DPA's appeal of the Cost Cap Regulation has been docketed as Appeal No. N16A-01-077 FSS.

12. After the filing of Dr. Firestone's Cease and Desist Motion, the Hearing Examiner appointed for this docket, Senior Hearing Examiner Mark Lawrence (the "Hearing Examiner"), communicated via email with the parties concerning how the Motion should be addressed. At the suggestion of Commission Staff, the Hearing Examiner convened a telephone conference of all the parties on January 7, 2016, to discuss a process for addressing Dr. Firestone's Cease and Desist Motion. After hearing from all parties during the call, the Hearing Examiner issued Order No. 8844, staying consideration of Dr. Firestone's Cease and Desist Motion.

13. In summary, the Hearing Examiner concluded that a stay of proceedings related to the Cease and Desist Motion was warranted because: (a) the issue on which Dr. Firestone wishes to enjoin DPA's advocacy – the interpretation of the RPS Cost Cap provisions and regulatory authority related to such provisions – is the subject of ongoing proceedings now pending before the Delaware Superior Court; (b) the issues raised by Dr. Firestone's Cease and Desist Motion would be more reasonably addressed after the D.C. Public Service Commission acts on the application presently pending before it and the Merger has been approved (assuming that the D.C. Public Service Commission approves the Merger); (c) the Commission lacks legal authority to enter a restraining order restricting positions taken by DPA; and (d) it would violate notions of public policy for the Commission to restrain DPA, an independent agency of the State, from advocating positions before DNREC, a sister State agency, or the Delaware Superior Court. *See* Order No. 8844 ¶¶ 3-6.

14. On January 11, 2016, Dr. Firestone filed his Motion to Quash, contending that the Hearing Examiner lacked authority to issue Order No. 8844 and that the Hearing Examiner acted arbitrarily and violated Dr. Firestone's rights in entering Order No. 8844.

ARGUMENT

A. The Motion to Vacate and Set Aside Order No. 8844 Should Be Denied

15. The Hearing Examiner's issuance of Order No. 8844 was appropriate and proper and represents a practical way to manage this docket. It would be premature for the Commission to consider the Cease and Desist Motion at this time given that: (a) the Merger remains subject to approval by the D.C. Public Service Commission; (b) the Cost Cap Regulation is subject to ongoing proceedings before the Delaware Superior Court, and the application of such regulation remains unsettled;¹¹ and (c) the impact, if any, of the final determinations related to the Cost Cap Regulation on Delmarva Power's REC purchase commitments under the settlement is unknown.

16. Given these procedural uncertainties, it makes practical sense to wait at least the following two events to take place before considering Dr. Firestone's Motions: (a) the approval of the Merger by the D.C. Public Service Commission, and (b) a declaration from DNREC as to whether it will freeze further RPS percentage increases pursuant to the RPS Cost Cap Regulation. For example, in the event that the D.C. Public Service Commission does not approve the Merger, there would be no need to consider Dr. Firestone's Motions because the Amended Settlement Agreement would become void, and Dr. Firestone's arguments would be rendered moot. There is no reason for the Commission to expend considerable time, energy and expense addressing Dr. Firestone's Motions when there may ultimately be no need to do so. Moreover, taking this practical approach would avoid having the Commission unnecessarily wade into much broader issues, including (a) whether the Commission has authority to enjoin DPA from taking actions related to matters that are not before the Commission, or (b) whether

¹¹ Although, as noted above, DNREC recently issued final Rules related to the freeze provisions of the Delaware RPS legislation, DNREC has not yet made a determination as to whether a freeze of further annual RPS percentage increases will be imposed.

Dr. Firestone even has standing to raise these particular issues concerning the Amended Settlement Agreement in view of the fact that he is not party to that Agreement.

17. In the Motion to Quash, Dr. Firestone asserts that the Hearing Examiner lacks authority to address procedural matters in this pending docket. Dr. Firestone takes an unduly limited view of the Hearing Examiner's power and authority. Order No. 8581, entered July 8, 2014, appointed the Hearing Examiner and generally provided him with authority over the docket. While there are tasks specifically delegated to the Hearing Examiner, such as presiding over pre-hearing conferences and related matters, the Joint Applicants have not understood the Hearing Examiner's authority to be limited to matters specifically delegated. Rather, the Hearing Examiner has general authority to manage the docket, subject to the oversight of the Commission. Although the Commission has approved the Amended Settlement Agreement and the Merger, there are further proceedings to be conducted in this docket, and the Hearing Examiner has not been discharged.

18. In the event that the Commission determines that the Hearing Examiner lacked authority to stay proceedings on the Cease and Desist Motion, the Commission should itself stay action on the Cease and Desist Motion until the Merger is approved by the D.C. Public Service Commission, and until DNREC determines to freeze annual increases of the RPS requirements. For the reasons outline above, the Cease and Desist Motion is premature.

B. To the Extent That the Commission Considers the Cease and Desist Motion, It Should Be Denied

19. In the Cease and Desist Motion, Dr. Firestone contends that the DPA lacks authority to advocate matters before DNREC. *See* Cease and Desist Motion ¶ 23. Such a view is inconsistent with DPA's express statutory authority to appear before regulatory agencies and to generally advocate for the lowest reasonable rates for consumers. 29 Del. C. § 8716(e)(2)-(3).

20. The Joint Applicants have never read the Amended Settlement Agreement as precluding the type of advocacy DPA has undertaken. In fact, the Amended Settlement Agreement provides DPA with a specific right to argue different positions in other proceedings. *See* ASA ¶ 110 (providing that the Settling Parties may argue different policy positions in other proceedings).¹²

21. Further, the relationship between DPA's advocacy and any requirement of the Amended Settlement Agreement is so attenuated that it is difficult to discern a connection between the two. Dr. Firestone's theory posits: that DPA's advocacy might result in changes to the regulatory framework governing the Cost Cap freeze determination (so far, it has not); that, as a consequence, this Commission might adopt a regulation or interpretation of the Cost Cap authority that would make more likely a freeze of the RPS requirements; that – as a result of DPA's advocacy – DNREC then might exercise its statutory authority to declare a freeze of further RPS percentage increases; that then, the freeze might dictate that the REC purchases required under the Amended Settlement Agreement would no longer be feasible; that such infeasibility might result in the Settling Parties considering the freeze and recommending to this Commission that the REC purchases be adjusted or eliminated; and that this Commission might then determine that the REC purchase transactions provided for under the Amended Settlement Agreement need not be pursued or undertaken. The Cease and Desist Motion invites the Commission to wade into these numerous hypotheticals without providing any compelling basis to do so.

¹² Section 110 of the Amended Settlement Agreement states: "None of the Settling Parties shall be prohibited from or prejudiced in arguing a different policy or position before the Commission in any other proceeding, as such agreements pertain only to this matter and to no other matter."

22. Although the Cease and Desist Motion suggests that a freeze would inevitably alter the REC purchase provisions presented in the Amended Settlement Agreement, Dr. Firestone does not explain why or how that is the case. Considerable speculation is required even to determine that the action that DPA has taken (which apparently has not been persuasive to DNREC) would ultimately have any impact on the REC purchase requirements in the Amended Settlement Agreement. Alternatively, it remains possible that the Merger would not be approved and the REC purchase provisions would be rendered moot. All of these open issues make it more prudent to address Dr. Firestone's Cease and Desist Motion – if it needs to be addressed at all – on the basis of a more complete record. However, if the Commission is inclined to consider the Motion based upon Dr. Firestone's urging, the Joint Applicants submit that the Cease and Desist Motion should be denied.

CONCLUSION

For the reasons stated above, the Joint Applicants respectfully request that Intervenor Jeremy Firestone's Motion to Quash, Vacate and Set Aside Stay Order be denied in its entirety. To the extent the Commission determines to decide Intervenor Jeremy Firestone's Motion for Cease and Desist Order Restraining the Delaware Division of the Public Advocate from Taking Actions Antagonistic to the Amended Settlement Agreement, that Motion should be denied on its merits for the reasons stated above.

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February 11, 2016

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CERTIFICATE OF SERVICE

I, Joseph C. Schoell, hereby certify that on this 11th day of February, 2016, that the within document was filed with the Public Service Commission, via DelaFile and mailed to:

Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, DE 19904

I further certify, on this same date, I e-mailed a copy of the same to all of the recipients identified on the Service List. See <https://delafile.delaware.gov/Global/AdvanceSearch.aspx> (last visited February 11, 2016).

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